

**IN THE UNITED STATES DISTRICT COURT  
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA**

BASF AGRO B.V., ARNHEM (NL),  
WÄDENSWIL BRANCH,  
BAYER S.A.S., and MERIAL LIMITED,

Plaintiffs,

v.

CHEMINOVA, INC.,

Defendant.

C.A. No. 10-cv-274

**REPLY BRIEF IN SUPPORT OF PLAINTIFFS' OBJECTION TO CONSOLIDATION  
OF *MARKMAN* HEARINGS IN THE CHEMINOVA AND MAKHTESHIM CASES**

Plaintiffs respectfully submit this Reply Brief in support of Plaintiffs' Objection to Consolidation of *Markman* Hearings in the Cheminova and Makhteshim Cases. (Pls.' Br. [D.I. 109]).<sup>1</sup>

Plaintiffs raised two primary objections concerning the potential consolidation of *Markman* proceedings in this case with the *Markman* hearing in the related case captioned *BASF, et al. v. Makhteshim, et al.*, 10-CV-276 (the "Makhteshim case"). First, the Cheminova case involves two process patents – the '848 and '943 patents – not in suit in the Makhteshim case. There is no reason to consolidate *Markman* on these two patents. (Pls.' Br. at 4). Second, Cheminova unilaterally inserted expert declarations into its *Markman* analysis, and necessary expert discovery

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<sup>1</sup> Plaintiffs did not understand the Court's April 6, 2011 Minute Order to require the parties to meet and confer, as Cheminova asserts. (Chem. Br. [D.I. 112] at 2). Plaintiffs understood they were directed to consider whether consolidation would be practical. In light of Cheminova's comments during the April 6 telephone conference with the Court, Plaintiffs believed consolidation was not practical, and therefore Plaintiffs filed their Objections. [D.I. 109].

cannot be completed prior to the scheduled May 2, 2011 *Markman* hearing in the Makhteshim case. (Pls.' Br. at 2-4).

Contrary to its position at the April 6 teleconference, Cheminova now only seeks consolidation of *Markman* proceedings pertaining to the patents the cases have in common - the '010 and '743 application patents. (Chem. Br. [D.I. 112] at 6 n.7). Cheminova no longer requests that the Court hear *Markman* argument pertaining to the '848 and '943 process patents at the May 2, 2011 hearing. (*Id.*). This issue is therefore moot.

Thus, the remaining issue is whether consolidation of the Cheminova and Makhteshim *Markman* hearings pertaining to the '010 and '743 application patents is appropriate. To this end, without waiver of their objections, Plaintiffs would agree to a consolidated *Markman* hearing on May 2, 2011 on the '010 and '743 application patents, if all of the disputed terms in both cases are construed. Plaintiffs' consent is based on Cheminova's agreement to 1) "waive any further request for expert discovery or supplementing the record" for the consolidated hearing and 2) proceed at the *Markman* hearing based on attorney argument only, without any live witnesses. (Chem. Br. [D.I. 112] at 7-8, 8 n.9).

Plaintiffs disagree with Cheminova's attempt to pick and choose which *Markman* terms are to be addressed at the May 2 hearing. (Chem. Br. [D.I. 112] at 8). Plaintiffs believe that the term "no quick knock down effect" should be construed along with all of the other claim terms in dispute. Plaintiffs agree with Cheminova that, whether that phrase is indefinite under 35 U.S.C. § 112 is properly addressed as part of any patent invalidity proceeding, not at *Markman*. (See Pls.' Answering Claim Construction Br. [D.I. 78] at p. 12 (citing *ASM America, Inc. v. Genus, Inc.*, No. C-01-2190-EDL, 2002 WL 1892200, at \*15-16 (N.D. Cal. Aug. 15, 2002) (declining to resolve indefiniteness argument during *Markman* phase))). However, Cheminova's allegation of

indefiniteness has no impact on whether construction of this claim term should occur during the May 2 *Markman* hearing.

Proceeding in this manner alleviates Plaintiffs' concerns - as no expert discovery is required prior to the May 2 hearing, and no live witnesses are required for the *Markman* proceedings.

As a result, Plaintiffs respectfully request that all claim terms in dispute in the '010 and '743 application patents be construed in both the Cheminova case and the Makhteshim case at the May 2, 2011 *Markman* hearing, which will be conducted only on the basis of attorney argument and without any live witnesses.

DATED: April 18, 2011.

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## **CERTIFICATE OF SERVICE**

I hereby certify that I electronically filed the **Reply Brief in Support of Plaintiffs' Objection to Consolidation of Marksman Hearings in the Cheminova and Makhteshim Cases** with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following CM/ECF participants: Daniel Alan M. Ruley, [aruley@belldavispitt.com](mailto:aruley@belldavispitt.com), William K. Davis, [wdavis@belldavispitt.com](mailto:wdavis@belldavispitt.com), Christopher G. Kelly, [christopher.kelly@hklaw.com](mailto:christopher.kelly@hklaw.com), Steven L. D'Alessandro, [steven.dalessandro@hklaw.com](mailto:steven.dalessandro@hklaw.com), Robert J. Burns, [robert.burns@hklaw.com](mailto:robert.burns@hklaw.com), Joshua C. Krumholz, [Joshua.krumholz@hklaw.com](mailto:Joshua.krumholz@hklaw.com), Jitendra Malik, [jmalik@alston.com](mailto:jmalik@alston.com), John Patrick Elsevier, [jpelsevier@jonesday.com](mailto:jpelsevier@jonesday.com), Matthew W. Howell, [matthew.howell@alston.com](mailto:matthew.howell@alston.com), Com, Judy C. Jarecki-Black, [jduy.jarecki@merial.com](mailto:jduy.jarecki@merial.com), and Frank G. Smith, [frank.smith@alson.com](mailto:frank.smith@alson.com).

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